

**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**SHAMIER FRASIER** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** ) **CIVIL ACTION NO.: STCV08-02081**  
 )  
 **STOKES CONTRACTING, INC., f/k/a** )  
 **STOKES TEMPORARY SERVICES,** )  
 **INC., SAVANNAH FOODS &** )  
 **INDUSTRIES, INC. and SAVANNAH** )  
 **FOODS INDUSTRIAL, INC.** )  
 )  
 **Defendants.** )

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**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**WILLIAM PROCTOR, Individually** )  
 **And as the Spouse of PATRICIA** )  
 **ANN PROCTOR, Deceased,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** ) **CIVIL ACTION NO.: STCV08-02082**  
 )  
 **STOKES CONTRACTING, INC., f/k/a** )  
 **STOKES TEMPORARY SERVICES,** )  
 **INC., SAVANNAH FOODS &** )  
 **INDUSTRIES, INC. and SAVANNAH** )  
 **FOODS INDUSTRIAL, INC.** )  
 )  
 **Defendants.** )

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**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**LATESHA HABERSHAM, Individually )  
And as the Spouse of MCKINLEY )  
HABERSHAM, Deceased, )  
)  
Plaintiff, )  
)**

**v. ) CIVIL ACTION NO.: STCV08-02083**

**STOKES CONTRACTING, INC., f/k/a )  
STOKES TEMPORARY SERVICES, )  
INC., SAVANNAH FOODS & )  
INDUSTRIES, INC. and SAVANNAH )  
FOODS INDUSTRIAL, INC. )  
)  
Defendants. )**

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**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**PAULETTE WILLIAMS, Individually )  
And as the Spouse of MICHAEL )  
WILLIAMS, Deceased, )  
)  
Plaintiff, )  
)**

**v. ) CIVIL ACTION NO.: STCV08-02084-CO**

**SAVANNAH FOODS & INDUSTRIES, )  
INC., SAVANNAH FOODS & )  
INDUSTRIAL, INC., SAVANNAH )  
MOLASSES & SPECIALTIES )  
COMPANY, IMPERIAL-SAVANNAH, )  
LP and IMPERIAL SUGAR )  
COMPANY )  
)  
Defendants. )**

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**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**WALTER B. MAXWELL** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** ) **CIVIL ACTION NO.: STCV08-02361**  
 )  
 **STOKES CONTRACTING, INC., f/k/a** )  
 **STOKES TEMPORARY SERVICES,** )  
 **INC., SAVANNAH FOODS &** )  
 **INDUSTRIES, INC. and SAVANNAH** )  
 **FOODS INDUSTRIAL, INC.** )  
 )  
 **Defendants.** )

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**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**JUSTIN PURNELL and,** )  
 **JENNIFER PURNELL,** )  
 )  
 **Plaintiffs,** )  
 )  
 **v.** ) **CIVIL ACTION NO.: STCV08-03629**  
 )  
 **STOKES CONTRACTING, INC. f/k/a** )  
 **STOKES TEMPORARY SERVICES,** )  
 **INC. and SAVANNAH FOODS &** )  
 **INDUSTRIAL, INC., and IMPERIAL** )  
 **DISTRIBUTING, INC.,** )  
 )  
 **Defendants.** )

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**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**DEBRA BYERS, Individually, and as )  
Executrix of the Estate of TRUITT )  
BYERS, Deceased, )  
)  
Plaintiff, )**

**CIVIL ACTION NO. STCV  
0805267**

**v. )  
)  
STOKES CONTRACTING, INC., )  
f/k/a STOKES TEMPORARY )  
SERVICES, INC., SAVANNAH FOODS )  
INDUSTRIAL, INC., IMPERIAL )  
DISTRIBUTING, INC., AMERICAN )  
INSTITUTE OF BAKING, INC., and )  
ZURICH SERVICES CORPORATION, )  
)  
Defendants. )**

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**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**PAUL SECKINGER, )  
)  
Plaintiff, )**

**CIVIL ACTION NO.  
STCV0805265**

**v. )  
)  
STOKES CONTRACTING, INC., )  
f/k/a STOKES TEMPORARY )  
SERVICES, INC., SAVANNAH FOODS )  
INDUSTRIAL, INC., IMPERIAL )  
DISTRIBUTING, INC., AMERICAN )  
INSTITUTE OF BAKING, INC., and )  
ZURICH SERVICES CORPORATION, )  
)  
Defendants. )**

**IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA**

**HELEN QUARTERMAN, Individually, )  
and as Surviving Spouse of EARL )  
QUARTERMAN, Deceased, )  
)  
Plaintiff, )**

**CIVIL ACTION NO. STCV  
805266**

**v. )  
)  
STOKES CONTRACTING, INC., )  
f/k/a STOKES TEMPORARY )  
SERVICES, INC., SAVANNAH FOODS )  
INDUSTRIAL, INC., IMPERIAL )  
DISTRIBUTING, INC., AMERICAN )  
INSTITUTE OF BAKING, INC., and )  
ZURICH SERVICES CORPORATION, )  
)  
Defendants. )**

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**MOTION TO STRIKE GRAHAM GRAHAM'S TESTIMONY  
AND BRIEF IN SUPPORT**

COME NOW Imperial Sugar Company, Savannah Foods & Industries, Inc., Savannah Foods Industrial, Inc., and Imperial Distributing, Inc. ("Imperial Defendants") and file this Motion to Strike Graham Graham's Testimony and Brief in Support. In Support of this Motion, the Imperial Defendants respectfully show the Court as follows:

**I. STATEMENT OF FACTS**

This case arises from an incident occurring at the Savannah Sugar Refinery in Port Wentworth, Georgia on February 7, 2008. Following the event, investigations were commenced by the local authorities, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), the Chemical Safety Board ("CSB"), and the Occupational Safety and Health Administration ("OSHA"). During the course of the OSHA investigation, Graham Graham, the former Vice

President of Operations for Imperial Sugar Company, revealed for the first time a document titled "Weekly Operations Focus — Week Ending 20th January 2007" ("January 20<sup>th</sup> Weekly Ops Report"). The document purported to be a report of Mr. Graham's observations and recommendations for the week ending January 20, 2008, following a recent site visit to the Port Wentworth plant.<sup>1</sup> The document was produced to counsel for Imperial in the OSHA litigation by Mr. Graham's personal counsel, Philip D. Hilder, in response to a post-incident request by OSHA (forwarded to Mr. Hilder by counsel for Imperial) seeking relevant documents maintained by Mr. Graham. Counsel for Imperial in the OSHA litigation produced the document to OSHA on July 3, 2008.

The January 20<sup>th</sup> Weekly Ops Report at issue contains the following text summarizing Mr. Graham's alleged pre-incident discussions with plant personnel in Port Wentworth: ". . . I predicted that if we did not make further significant improvements in our behavior and control of our work activities, a disaster such as an explosion would occur because we had failed to fix equipment correctly, followed proper rules and applied the right procedures." (See January 20<sup>th</sup> Weekly Ops Report, attached hereto as Exhibit "A"). As of the date of this filing, the January 20<sup>th</sup> Weekly Ops Report is the only document produced by Mr. Graham or any other party in this case that contains any alleged pre-incident "prediction" or "warning" by Mr. Graham that an "explosion" would occur at the Port Wentworth facility.

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<sup>1</sup> Mr. Graham testified that the document heading incorrectly indicates the year as 2007 when it should indicate 2008. (See Deposition of Graham H. Graham, pp. 261-262, quoted portions attached hereto as Exhibit "B"). Likewise, the document date indicated in the document footer ("10 November 2007") is also erroneous. *Id.* at 175. While testimony regarding Exhibit 55 was previously designated confidential by Defendants pursuant to the Court's Order governing confidentiality, Defendants have specifically withdrawn their designation of confidentiality as to Exhibit 55 and any deposition testimony related to or discussing Exhibit 55. (See Letters of April 15, 2009 and April 17, 2009, attached hereto as Exhibit "C"). Since there remains other un-cited portions of Mr. Graham's testimony that have been designated as confidential, Defendants request that the entire transcript be filed under seal by Plaintiffs' counsel.

On July 29, 2008, Mr. Graham voluntarily appeared before the United States Senate Committee on Health, Education, Labor & Pensions (Subcommittee on Employment and Workplace Safety) to testify at a hearing entitled: “Dangerous Dust: Is OSHA doing Enough to Protect Workers?” During his testimony before the Senate Subcommittee, Mr. Graham made reference to alleged instances where he had reported his observations at the Port Wentworth facility to the Imperial management team, specifically referencing the subject visit to Port Wentworth as follows: “As with my previous visits, I sent Mr. Sheptor and Mr. Peiser summaries of my observations, actions and my expressed concern for the employees’ safety, especially those at Port Wentworth. I stated that I believed a fatal disaster would befall the refinery if a fundamental change in the way the plant was being operated hadn’t -- did not take place.” (See Hearing Transcript Excerpt of Testimony of Graham H. Graham before the U.S. Senate Committee on Health, Education, Labor & Pensions (Subcommittee on Employment and Workplace Safety) attached hereto as Exhibit “D”).

Following his appearance before the Senate, Mr. Graham's January 20th Weekly Ops Report was produced by Mr. Graham’s personal counsel, Mr. Hilder, to counsel for Imperial in the present litigation on September 12, 2008. The Imperial Defendants subsequently produced the January 20th Weekly Ops Report to Plaintiffs in the present cases. (See January 20<sup>th</sup> Weekly Ops Report, HARVEY CONFIDENTIAL 028047-028048, attached hereto as Exhibit “E”).

On October 14, 2008, Mr. Graham gave a deposition in the present cases. The January 20th Weekly Ops Report was marked by Plaintiffs’ counsel as Exhibit 55 to Mr. Graham’s deposition. (*Id.*). Mr. Graham unequivocally testified during his deposition that he prepared the January 20th Weekly Ops Report on his laptop **prior** to the February 7, 2008, incident and that

he forwarded the report to Imperial COO, John Sheptor, and Imperial CEO, Bob Peiser. (Graham Graham depo., pp. 261-262).

Mr. Graham's testimony is knowingly false. Imperial has uncovered evidence that the document was created post-incident on **February 10, 2008**, and was never forwarded to Mr. Sheptor nor Mr. Peiser.

To investigate the January 20<sup>th</sup> Weekly Ops Report, Imperial retained two independent forensic computer consultants — Kroll OnTrack ("Kroll") and Sirius Solutions, LLP ("Sirius")<sup>2</sup> — to conduct forensic computer analyses of Mr. Graham's laptop hard drive and Imperial's computer systems. Both Kroll and Sirius concluded that Mr. Graham used his Imperial issued laptop to create the subject document, entitled "Weekly Operations Focus WE 20th January 2008.doc," on **February 10, 2008**, three days **after** the incident. Copies of Kroll's and Sirius' forensic computer analyses are attached hereto as Exhibits "F" and "G", respectively. The searches of Imperial's e-mail server further revealed that the document in question was not e-mailed by Mr. Graham to anyone, Imperial employee or otherwise, until February 24, 2008, when it was e-mailed to Mr. Graham's wife's private e-mail account under the name [lorahallgraham@comcast.net](mailto:lorahallgraham@comcast.net). (Kroll Report, pp. 3, 9). Since Mr. Graham's report was created after the incident and Mr. Graham knowingly provided false testimony concerning the creation and distribution of the alleged report, his testimony should be stricken and the subject report excluded from evidence.

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<sup>2</sup> Sirius served as the custodian of the image of the hard drive and will only testify, if at all, in that regard. Imperial will not designate Sirius to serve as an expert witness regarding the analysis of the hard drive or document.

## II. ARGUMENT AND CITATION TO AUTHORITY

### A. **GRAHAM GRAHAM'S POST-INCIDENT REPORT AND ALL TESTIMONY REGARDING THE REPORT SHOULD BE STRICKEN IN ITS ENTIRETY BECAUSE IT CONSTITUTES A WILLFUL AND KNOWING FALSEHOOD UNDER O.C.G.A. § 24-9-85(b).**

Pursuant to O.C.G.A. § 24-9-85(b), “[i]f a witness shall willfully and knowingly swear falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence.” The forensic computer analysis performed by Kroll on Mr. Graham's laptop computer shows that the document titled “Weekly Operations Focus WE 20th January 2008.doc” was created on February 10, 2008. (Kroll Report, pp. 3, 9). Mr. Graham knowingly testified to the contrary during the following exchange in his deposition:

MR. DIAL: Next, I'd like to have, if we have it, Exhibit 55 to place in front of the witness. I think you've got it collected over there, Jeremy.

MR. DIAL: It's the weekly operations focus, January 20th. Okay.

Q Again, as with the other documents, is this a document you prepared?

A Yes.

Q Okay. And did you -- when did you prepare this document?

A Well, it would have been week ending the 20th of January.

Q And that would be January of 2008?

A Yeah. I've got a typo in here. Yeah, it says 2007. That's a typo.

Q **So just so we're clear on the record, you prepared this document in January of 2008, near the week ending January 20th?**

A **Yeah, obviously not 2007.** I was in Las Vegas at the time, so that was a typo on my part.

Q Did you prepare this -- did you forward this document to Mr. Pizer (sic) and Mr. Sheptor?

A Yes. Certainly at least one of them, if not both.

**Q Okay. And did you -- you prepared this prior to the February 7th explosion?**

**A Of course. Yeah, I wrote this on or around the 20th of January.**

Q Okay. And, again, utilizing your laptop?

A Yeah.

(Graham Graham depo., pp. 261 - 262) (emphasis added).

Contrary to Mr. Graham's testimony, this document was not e-mailed to John Sheptor, COO of Imperial Sugar Company at the time. Mr. Sheptor explained during his deposition<sup>3</sup>:

Q (BY MR. MIXSON) Well, did you get Exhibit 55?

A I did not.

Q All right. So you got all the others, but not the one stickered Exhibit 55; is that correct?

A That's correct.

Q You think it's possible you just got it and didn't read it?

A I am confident that I did not receive this.

Q Okay. Why do you think you didn't get it?

A When this was brought to my attention by counsel last summer, I was concerned about the content of this email . . . and I went to my computer and I searched for the e-mail and there wasn't any evidence that I had ever received it.

Q Well, I don't know if it was e-mailed or not, but Exhibit 55 specifically is not in the form of an e-mail, is it?

A Exhibit 55 . . . per Mr. Graham was e-mailed to me.

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<sup>3</sup> The cited portions of Mr. Sheptor's testimony above have not been designated as confidential by Defendants. However, since other portions of the testimony have been designated confidential pursuant to the Court's Order governing confidentiality, Defendants request that the entire original transcript be filed under seal by counsel for the Plaintiffs.

Q All right. So in -- but in addition to going out as an e-mail, it looks to me like it's printed up in a report form, not in an e-mail format, correct?

A Mr. Graham sent, as a matter of format, to me his weekly operations reports . . . as an attachment to an e-mail.

Q All right. But you -- you're testifying under oath it just never came to your office?

A I am testifying under oath that I never received this e-mail. I was concerned about this e-mail . . . and I asked counsel to verify whether I ever received this e-mail. Counsel, in turn, contracted with two different forensics companies in order to check Mr. Graham's hard drive to see whether he ever produced this . . . e-mail. Mr. Graham created this e-mail, per those inspection reports, on the 10th of February, three days after the explosion and he never sent it to anyone, including me or any other employee of the company.

(John Sheptor depo., pp. 129 - 132).

Likewise, counsel for Imperial has consulted with personal counsel for former Imperial CEO, Bob Peiser, and confirmed that Mr. Peiser also never received the document in question, via e-mail or otherwise, either prior to or subsequent to the February 7, 2008 event. As previously stated, the analysis conducted by Kroll and Sirius also revealed that Mr. Graham never sent the subject document to Mr. Peiser via e-mail prior to or subsequent to the February 7, 2008 event. (*See* Kroll and Sirius Reports).

The Kroll and Sirius analyses both confirm that the report in question was created on February 10, 2008, and was never distributed by e-mail to any employee of Imperial. There is absolutely no evidence in this case supporting Mr. Graham's testimony that he drafted and distributed this document prior to the incident. To the contrary, the uncontroverted evidence shows that the document was created post-incident and was not distributed by e-mail to anyone

by Mr. Graham until February 24, 2008, and then only to his wife's private e-mail account under the name [lorahallgraham@comcast.net](mailto:lorahallgraham@comcast.net). (See Kroll Report, pp. 3, 9).

In *Fugitt v. State*, 251 Ga. 451, 452-53, 307 S.E.2d 471 (1983), the Supreme Court of Georgia ruled that, pursuant to O.C.G.A. § 24-9-85(b), testimony that is willfully and knowingly false **must** be disregarded in its entirety. See also *Pickens v. State*, 225 Ga. App. 792, 797, 484 S.E.2d 731, 737 (1997) (recognizing that the maxim “[f]alse in one thing, false in everything” applies when a witness has willingly or knowingly given false, material testimony) (internal quotations and citation omitted). In *Fugitt*, a witness testified that he saw the defendant place a man, bound and gagged, in a car, and that, a few days later, the defendant told the witness that he had choked the man to death and abandoned his body. *Fugitt*, 251 Ga. at 451-452. After the trial it was discovered that the witness was incarcerated at the time of the killing. *Id.* at 452. The witness could not possibly have seen or spoken with the defendant at the time of the killing as was represented at trial.

Responding to defendant's extraordinary motion for a new trial, the trial court held that the witness' testimony was “merely impeaching” and that “removing his testimony from the trial would not be so material that it would probably produce a different verdict.” *Fugitt*, 251 Ga. at 452. Upon review, the Supreme Court of Georgia held that the trial court's finding was error as there was “no doubt of any kind that the [witness'] testimony in every material part [was] purest fabrication” and that it went “to the heart of our system of criminal justice.” *Id.* at 453. Accordingly, the Court held that “a new trial must be ordered.” *Id.* The Court did so “because [it could not and would not] approve the corruption of the truth-seeking function of the trial process.” *Id.* (citation omitted). Like the testimony at issue in *Fugitt*, Mr. Graham's testimony and his post-incident report in every material part are pure fabrication and corrupt the

truth seeking function of the trial process. Therefore, pursuant to O.C.G.A. § 24-9-85(b), Mr. Graham's testimony and his post-incident report must be disregarded in their entirety.

**B. GRAHAM GRAHAM'S TESTIMONY AND HIS POST-INCIDENT REPORT SHOULD BE STRICKEN IN THEIR ENTIRETY BECAUSE THEY LACK PROBATIVE VALUE.**

In addition to constituting a willful and knowing falsehood pursuant to O.C.G.A. § 24-9-85(b), the testimony of Mr. Graham and his post-incident report lack probative value. Mr. Graham, in Paragraph three of the January 20th Weekly Ops Report at issue, states: "I predicted that if we did not make further significant improvements in our behavior and control of our work activities, a disaster such as an explosion would occur because we had failed to fix equipment correctly, followed proper rules, and applied the right procedures." (January 20<sup>th</sup> Weekly Ops Report, HARVEY CONFIDENTIAL 028047-028048, ¶ 3). The January 20th Weekly Ops report thus purports to be a warning of a future event. In actuality, this report was generated by Mr. Graham after the event took place.

In *Claybourn v. State*, 190 Ga. 861, 865, 11 S.E.2d 23 (1940), the Court held that mere exculpatory and self-serving declaration by the defendant was "entirely without probative value" and was "clearly inadmissible as evidence". *See also Dozier v. J. D. Parker*, 219 Ga. 725, 728, 135 S.E.2d 857 (1964) (Court held affidavit attached to petition as an exhibit "did not give [the affidavit] any probative value as evidence for the plaintiff, since the defendant's answer denied its truth ... [and] [t]he evidence of the defendant contradicted the substantial averments of the affidavit"). Mr. Graham's testimony and report are the types of declarations the Supreme Court of Georgia held were inadmissible in *Claybourn* and *Dozier*.

As discussed above, Mr. Graham did not draft his "warning" to Imperial until after the February 7, 2008 incident. Furthermore, he never sent the report to anyone other than his wife.

The Kroll report and testimony of Mr. Sheptor make the following points clear -- Mr. Graham's testimony regarding his January 20th Weekly Ops Report, and the report itself, are nothing more than exculpatory, self-serving and willful falsehoods given under oath. Pursuant to the Georgia Supreme Court's holdings in *Claybourn* and *Dozier*, such evidence is completely devoid of probative value and is, therefore, inadmissible. Introduction at trial would only serve to inflame the jury and would be highly prejudicial to the Imperial Defendants. The probative value of this evidence, or complete lack thereof, is outweighed by its highly prejudicial effect.

### **III. CONCLUSION**

Mr. Graham knowingly provided false testimony concerning the creation and distribution of the alleged January 20<sup>th</sup> Weekly Ops Report during his deposition in the present cases. Allowing this testimony to remain a part of the record offends the truth-seeking function of the trial process. Therefore, the Imperial Defendants respectfully request that Mr. Graham's deposition testimony regarding the alleged January 20<sup>th</sup> Weekly Ops Report be stricken from the record and the subject report excluded from evidence.

Respectfully submitted this \_\_\_\_ day of April, 2009

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the **MOTION TO STRIKE GRAHAM GRAHAM'S TESTIMONY AND BRIEF IN SUPPORT** has, by depositing said pleading in the United States Mail with adequate postage affixed thereto to assure delivery, been furnished to all counsel of record as follows:

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